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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 336

ANTON LYSCZYK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1968. The petition for a writ of certiorari was filed on July 24, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly refused to entertain petitioner's claim, raised for the first time on appeal, that a ledger should have been excluded from evidence because the affidavit in support of the warrant under which it was seized failed to support the finding of probable cause.

2. Whether the government was required to grant immunity from prosecution to witnesses called by the defense, to enable them to testify without risk of self-incrimination.

STATEMENT

After a jury trial in the United States District Court for the Western District of Wisconsin, petitioner and one Marcia Lyon were convicted on two counts charging them with traveling in and using the facilities of interstate commerce with intent to carry on prostitution in violation of the laws of Wisconsin, and causing others so to travel, and with conspiring to do so (18 U.S.C. 1952, 371). Four other counts were dismissed before and at the trial. On June 19, 1967, petitioner and Miss Lyon were each sentenced to concurrent terms of three years' imprisonment and fined $1,000. The court of appeals affirmed as to petitioner, one judge dissenting on the question of the affidavit for the search warrant (Pet. App. 1a-18a).[1]

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[1] Miss Lyon's conviction was reversed under *Bruton* v. *United States*, 391 U.S. 123, because oral admissions made by petitioner and received in evidence, implicated Miss Lyon. See Pet. App. 6a-7a.

The sufficiency of the evidence is not in issue. Four witnesses testified that, during the period charged in the indictment (See D. App. 6-8),[2] they worked as prostitutes at defendants' premises in Hurley, Wisconsin (D. App. 69-70, 77-78, 82, 87-88). One of these witnesses, Miss Payne, testified that on June 10, 1965, petitioner drove her to the airport at Ironwood, Michigan, and that from there she flew to Wausau, Wisconsin, to meet a man for purposes of prostitution. As with all her earnings, she paid half the proceeds of this meeting ($50) for "room and board" (D. App. 69-70).

F.B.I. Agent Wessel testified that on various occasions he had conversations with petitioner, at which petitioner admitted running a business in Hurley, Wisconsin, which employed prostitutes from out of state. Petitioner indicated that he was co-owner of the premises in which the house of prostitution operated and that he reaped profits from the enterprise. He also admitted having taken Alice Payne to the airport on June 10, 1965, knowing that the purpose of her trip was prostitution (D. App. 94-98; see Pet. App. 7a-8a).

ARGUMENT

1. At trial, a ledger seized by federal agents from defendants' premises pursuant to a search warrant was admitted into evidence. As described by petitioner's co-defendant, Miss Lyon, and the four prosti-

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[2] "D. App." refers to defendants' appendix in the court of appeals, containing excerpts from the proceedings at trial. A copy of this appendix is on file with the Clerk of this Court.

tutes employed at their establishment, the ledger contained the names and city of origin of gentlemen customers, along with a number associated with each name. When they arrived at the door, the men were granted admittance after displaying a card showing the number (D. App. 75-76, 78-79, 87, 149-150). The ledger also had entries showing the girl with whom the gentlemen spent time and the amount paid for the room and to the girl (D. App. 151).

Petitioner objected at trial when the government first sought to introduce testimony concerning the ledger, solely on the grounds that the warrant had improperly been served on petitioner rather than on Miss Lyon, and that no warnings were given to Miss Lyon by the agents executing the warrant (D. App. 70-71). At a hearing outside the presence of the jury, an F.B.I. agent testified as to how the warrant had been executed (D. App. 72-75). The trial judge then ruled that the ledger had been properly seized and was admissible (D. App. 75).

On appeal, petitioner contended for the first time that the affidavit in support of the search warrant was not sufficient to show probable cause. The court of appeals, one judge dissenting, declined to consider the merits of this claim, relying on Rule 41(e), F. R. Crim. P. (Pet. App. 3a). In the context of this case, the court below acted permissibly in refusing to pass upon the sufficiency of the affidavit.

Rule 41(e) provides in part:

> * * * The motion [to suppress] shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of

> the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

The Rule was designed to create an orderly procedure for judicial resolution of "disputes over police conduct not immediately relevant to the question of guilt." *Jones* v. *United States*, 362 U.S. 257, 264; *Segurola* v. *United States*, 275 U.S. 106, 111-112. Numerous cases hold that, absent a motion to suppress prior to or during a trial, or a showing of excusable neglect in failing to make such a motion, claims of illegal search and seizure will not normally thereafter be reviewed. See, *e.g.*, *Kuhl* v. *United States*, 370 F. 2d 20, 21 (C.A. 9) (en banc); *United States* v. *Burrell*, 324 F. 2d 115, 119 (C.A. 7), certiorari denied, 376 U.S. 937.

Petitioner contends, however, that the affidavit in support of the warrant was clearly insufficient, and that admission of the ledger affected substantial rights, so that the question could be noticed under the "plain error" rule (Rule 52(b), F. R. Crim. P.). This was the view of the dissenting judge. Pet. App. 15a. We do not, of course, dispute the existence of power in a court of appeals to review "[p]lain errors or defects affecting substantial rights" in the context of Fourth Amendment claims, nor do we interpret the majority as denying that power. Rule 52(b), however, is by its own terms discretionary. With regard to whether or not discretion should be exercised, it is pertinent to point out, as the Second Circuit has reasoned, that the considerations of finality reflected in Rule 41 (e) have particular weight in cases like the present,

where a defendant has been represented by retained and experienced trial counsel, who must be assumed to have made a conscious decision not to raise the matter before the trial court. *Indiviglio* v. *United States*, 352 F. 2d 276, 280-281 (C.A. 2), certiorari denied, 383 U.S. 907. Especially where counsel has focused on the evidence before or at trial and has urged several grounds for its exclusion, it would frustrate the purpose of Rule 41(e) and sound interests of judicial administration—without any improvement in the reliability of the fact-finding process—to hold that a new theory for excluding the evidence must be entertained for the first time on appeal.

In any event, we do not believe that there was a plain deficiency in the affidavit. (The affidavit is set forth at Pet. 5-7.) While its pertinent allegations are couched in terms of information and belief, and there is nothing directly in the affidavit to indicate that the "affiant's unidentified source 'spoke with personal knowledge,'" *Aguilar* v. *Texas*, 378 U.S. 108, 113, the fact that he did so may be validly inferred from the detailed description of the ledger book in the affidavit.[8] It is unlikely that this detail would be known except to one personally familiar with the premises. See *United States* v. *Soyka*, 394 F. 2d 452, 453 (C.A. 2) (en banc), petition for a writ of certiorari pending, No. 490 Misc., this Term. In addition, the affiant re-

[8] The affidavit describes the ledger book as containing "numbers which have been assigned to acceptable patrons of her illegal operation of a house of prostitution * * * [and] the name of the city of address of such patron, followed by a numerical number which indicates the price paid for the services of a prostitute" (Pet. 6).

cited that he had personally investigated the complaints of illegal activities, knew personally that co-defendant Lyon operated the establishment in question, "and that as such operator *and* on information and belief she has maintained a ledger book containing numbers which have been assigned to acceptable patrons of her illegal operation of a house of prostitution * * *" (Pet. 5-6) (emphasis added). The affidavit here thus sets forth much more than the wholly conclusory affidavits in *Aguilar* v. *Texas*, *supra*, or *Riggan* v. *Virginia*, 384 U.S. 152. The affidavit is not so plainly insufficient as to render admission of the ledger "plain error." Moreover, although petitioner characterizes the ledger as a "key piece of physical evidence" (Pet. 11), it may be questioned whether its admission truly affected "substantial rights," in view of the independent testimony of the four prostitutes acknowledging that they plied their trade in petitioner's premises, and of petitioner's own numerous admissions of the illegal activity with which he was charged.

2. Well before the trial, the government had determined that it did not need as witnesses two men named Small and Stone, whom it had subpoenaed (D. App. 104-105). The record shows that the two men had been customers of some of the prostitutes who later testified at trial (D. App. 70, 88, 134-135).[4]

[4] The testimony of one of these prostitutes, Miss DeLay, was ordered stricken by the court after she invoked the Fifth Amendment on cross-examination with regard to questions about her present employment and other collateral matters deemed essential to an attack upon her credibility (see D. App. 141-142; Pet. App. 9a-12a). Miss DeLay indicated

The defense elected to call Small and Stone as its witnesses, but each invoked the privilege against self-incrimination with regard to all relevant matters. Defense counsel thereupon made a motion to the court to grant the witnesses immunity and also asked the prosecutor to do so. The prosecutor refused, and the court declined, on grounds of lack of power, to order that immunity be conferred (see D. App. 159-160). Petitioner argues that the government's failure to grant immunity to Small and Stone deprived him of a fair trial.

The court of appeals' decision rejecting this contention (Pet. App. 13a) is sound. There is no general obligation on the part of the government to insure that a witness the defense seeks to call will be available to testify without risking self-incrimination.[8] The precise question was presented, in a more difficult context, in *Earl* v. *United States*, 361 F. 2d 531 (C.A.D.C.), petition for rehearing en banc denied with statement of four dissenting judges, 364 F. 2d 666, certiorari denied, 388 U.S. 921; see also, *Morrison* v. *United States*, 365 F. 2d 521 (C.A.D.C.). In *Earl*, the defendant, who claimed that he was the victim of mistaken identification in a narcotics case, demanded that the government grant immunity to his co-defendant (against whom the instant charges had been dismissed following his plea of guilty to another crime), and tendered a proffer that the co-defendant

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through counsel that Small was her present employer (D. App. 105).

[8] The question is quite distinguishable from problems of prosecutorial suppression of exculpatory physical evidence. See *Brady* v. *Maryland*, 373 U.S. 82.

would testify that he (the defendant) was not involved in the transaction. The court held that no rights of the defendant were transgressed, but indicated it would have more problems had the government secured testimony from one eyewitness under a grant of immunity, while denying this opportunity to a co-defendant. 361 F. 2d, at 534 n. 1. Here, unlike the situation in *Earl*, the defense made no proffer with respect to the witnesses' testimony, so that it is mere speculation whether their answers to defense counsel's questions would even have been favorable to the defense, much less potentially vital. Whatever the obligations of the government in a case such as the hypothetical one described by the court in *Earl*, there was plainly no duty to immunize Messrs. Small and Stone from all prosecution in order to permit petitioner access to testimony of uncertain content or significance. Re-enforcing the probability that anything they might have said would have been of only marginal weight and relevance is the overwhelming strength of the case—including petitioner's own admissions—against him.[6]

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[6] For the same reason, the fact that one of the government's witnesses (Miss Payne) was promised that the charges against her would be dropped if she testified (see D. App. 77) does not bring this case within the hypothetical posed by the court of appeals in *Earl*. That hypothetical, which was viewed as raising a serious question of fairness, presupposes that there are two criminally inculpated eyewitnesses to a crime, one of whom, the defendant alleges, would testify as to his non-participation, and that the government grants immunity only to the other, who then inculpates the defendant at trial. Here, apart from Miss Payne, and Miss DeLay,

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1968.

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whose testimony was stricken, no government witness was offered any kind of immunity or incentive to testify.

We note further that *Washington* v. *Texas*, 388 U.S. 14, cited by petitioner (Pet. 13), is inapposite. That case held unconstitutional under the Sixth Amendment a State statute making a defendant absolutely incompetent as a witness for his co-defendant.

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